

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1147

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Pg 5

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Docket No. 77-1147
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UNITED STATES OF AMERICA,

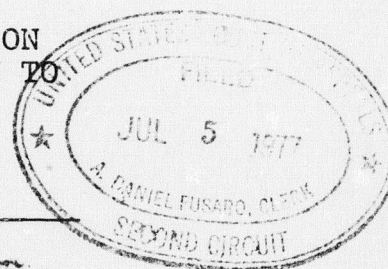
Appellee,

vs.

JOSEPH FALCO, et al.

Defendant-Appellants.
-----x

PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC WITH MOTION TO
STAY THE MANDATE



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PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
WITH MOTION TO STAY THE MANDATE

TO THE HONORABLE VAN GRAAFEILAND, GURFEIN AND MULLIGAN,
Circuit Judges:

The petitioner, JOSEPH FALCO, respectfully
petitions this Court for a rehearing of the order of
this Court made the 24th day of June, 1977, affirming
his conviction for violations of 18 USC 1955.

GROUND'S FOR PETITION

1. The Court is urged to reconsider its decision in view of the high degree of probability of substantial adverse influence upon the jury by the error twice introduced before them, of appellant Falco's prior FBI investigation, first on the government's direct case and then upon the accidental re-reading of the struck testimony, shortly before the verdict. The Court further is urged to apply the criteria for federal review set forth by the Supreme Court in Kotteakos v. United States,* to the effect that even if the reviewing court can find enough evidence in the record to support the verdict, unless it can be said with fair assurance that the jury was not substantially influenced by the error, the verdict should not stand.**

* 328 US 750, 764-765

**"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, ... the conviction cannot stand." (emphasis added) (The error here also violated "a specific command of Congress:" 18 USC 2518 (8) (a) covered in Part (2) of this petition).

It is true that the prejudicial testimony was struck and that the jury was instructed on it by the Court. However, it is respectfully submitted that even if one were to ignore the classic observation of Justice Jackson* that it is an "unmitigated fiction" that "prejudicial effects can be overcome by instructions to the jury..." it still seems impossible in this case to conclude with any assurance that the jury verdict was not substantially influenced by the error. The jury was reminded of the prejudicial testimony at a time so crucially close to the verdict that any instructions to disregard, had to be beyond the mental application by the merely mortal members of the jury.

It must also be clear that the second reminder of the prejudicial testimony could not have escaped the jury's attention. It was the jury that asked for the testimony to be re-read. Surely when a jury requests the re-reading of testimony they do so for the purpose of listening to it closely, and common experience indicates that they do indeed pay close attention. And in this case, the testimony was not lengthy enough for the jury to have missed anything.

*Krulwitch v. United States, 336 US 440

Furthermore, the testimony itself, by its very nature, has been consistently acknowledged by our Courts to be the kind of evidence that exerts a substantial influence upon juries, in fact too substantial an influence. Evidence of "prior trouble with the law" tends to "weigh too much with the jury" so as to deny an accused a fair opportunity to defend against a specific charge. Michelson v. United States, 335 U.S. 469, 475*

Furthermore, it cannot be disputed that for the jury the question of Falco's guilt or innocence was not open and shut. During its deliberations, the jury made three requests. (Tr 609-612) Each of the three jury requests clearly pertained chiefly to Falco. Falco was the only defendant on trial who was a "comparative outsider" (US v. Todaro**) from the major gambling operation. The other three defendants on trial were accused of being inside the gambling ring. It remains undisputed that appellant Falco's only link to the charge of conducting the Dixon gambling operation was solely based on the charge that he accepted layoff bets from the operation but in all other respects was not involved in it.

*Additionally, the evidence in question implied not only prior but also extensive wiretapping of Joseph Falco. The lower Courts' charge suggesting that "organized crime" was a factor in this case, may have added to the prejudice (TR461)

**No. 76-1355, Slip op. 1967, 1971 (2nd Cir Feb. 24, 1977)

The first jury request (Tr 609) was for the government's chart (Exhibit 45) which pertained to only one defendant on trial: Falco. (Tr 410-412) The second jury request asked for clarification of layoffs pertaining again to Falco. The third and final request, which was fulfilled shortly before the verdict, asked for a re-reading of the testimony of the only major witness against Falco. And it was during that period of time, when the jury's decision regarding Falco was clearly hanging in the balance, that the struck testimony reminding the jury that Falco had had prior "trouble with the law" came in. A short time later, the jury returned a verdict of guilty.

It is respectfully submitted that it cannot be said with any degree of assurance that the error of introducing this testimony did not substantially influence the jury. It appears most probable that it did, and in all probability it succeeded in turning the tide against the defendant. Moreover, it is submitted, as stated in 8 B Moore's Federal Practice ¶52.03 (1), that in balancing the probabilities with respect to the harmlessness, or harmfulness, of an error and its effect upon a jury, "defendant should get the benefit of the doubt."

2. Reconsideration is respectfully requested of that portion of this Court's decision which expressed the view that United States v. Fury* undercut appellant's assertion of error with respect to the government's use at trial of the above discussed testimony which was derived from the contents of wiretaps suppressed in United States v. Gigante.** This Court's decision appeared to indicate that Fury may be a sanction for the government to use at trial evidence derived from wiretaps suppressible under Gigante. The extension of Fury to this case affects not only appellant but may affect the conduct of other criminal trials and grand jury proceedings in this Circuit.

It is respectfully submitted that Fury cannot be so extended. The same statute 18 USC 2518 (8) (a) that compelled the Court in Gigante to suppress the wiretaps ("...the plain wording of the statute requires that this evidence be suppressed.") clearly also by its wording compels the prohibition in this, or any other case, of the use at trial or in the grand jury of testimony regarding "evidence derived" from such wiretaps.

The statute expressly provides that unless the sealing provisions are satisfied, the "contents" of wiretaps or

*76 -1506, Slip op. 3195,3213 (2nd Cir. 1977)

**538 F2d. 502 (2nd Cir. 1976)

"evidence derived therefrom" cannot be used "under subsection (3) of section 2517." Subsection (3) of §2517 pertains to the use of the "contents" of wiretaps and "evidence derived therefrom" in testimony given in any federal or state proceeding. §2518 (8) (a) expressly prohibits such use, as stated above.

In contrast, use under subsections (1) and (2) of §2517 is not expressly prohibited under §2518 (8) (a). Subsections (1) and (2) pertain to use of information obtained by law enforcement officers during the investigatory stage. In Fury, under an analagous New York State statute the use of derivative information during the investigatory stage was held to be permissible for obtaining probable cause for a warrant.

The distinction is clear. In this case or any other, the statute expressly forbids the use of testimony in a proceeding such as a trial using evidence derived from the contents of wiretaps suppressible under Gigante. In this case the government purposefully violated this "specific command of Congress" in knowingly (Tr 203, lines 18-21) introducing testimony derived from the contents of wiretaps actually and already suppressed in U.S. v. Gigante.

In Kotteakos, (supra, pg. 1 of this petition) the Supreme Court indicated that when the error constitutes a

departure from "a specific command of Congress" the reasons for reversal are especially warranted. Here, the double-barreled error encompassing both the violation of the statute and the introduction of prejudicial evidence of "prior trouble with the law" with its double impact on the jury by virtue of its twice being visited upon them, should warrant reversal.

Appellant respectfully requests that if this Court declines to rehear, that this matter be submitted for consideration en banc.

We also move herewith to stay the mandate pending the determination of this petition.

CONCLUSION

The petition for rehearing should be granted and the mandate in this case should be stayed.

Respectfully submitted,

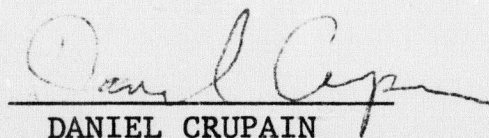


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CERTIFICATION

I, DANIEL CRUPAIN, attorney for appellant JOSEPH FALCO, hereby certify that this petition for rehearing, etc., is made in good faith and not for the purpose of delay.

DATED: July 4, 1977


DANIEL CRUPAIN

RECEIVED
JUL 5 1977
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